

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

1 Apr 20, 2021
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SEAN F. McAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEREMY OLSEN,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as the Secretary of the United States Department of Health and Human Services,

Defendant.

No. 2:20-cv-00374-SMJ

ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

Before the Court, without oral argument, is Plaintiff's Motion for Attorneys' Fees, ECF No. 43. The Court has reviewed the record and pleadings in this matter, is fully informed, and grants the motion.

BACKGROUND

Plaintiff Jeremy Olsen is a 41-year-old Type I diabetic who has suffered kidney failure and undergone a kidney transplant due to his condition. ECF No. 1 at 10. Plaintiff uses a Medtronic MiniMed Continuous Glucose Monitor ("CGM"), which he alleges a doctor prescribed to help avoid failure of his transplanted kidney and prevent other complications from his diabetes. *Id.* at 11. Plaintiff suffers from

1 hypoglycemic unawareness, meaning he cannot tell when his blood sugar is low.

2 *See AR 041.*

3 After his claim for Medicare coverage of the CGM supplies was initially
4 denied as not “durable medical equipment,” an Administrative Law Judge
5 eventually approved Plaintiff’s claim. *Id.* at 11–12. But the Medicare Appeals
6 Council/Departmental Review Board (“Appeals Council”) reversed the ALJ,
7 determining that a CGM is not “durable medical equipment” because it is not
8 “primarily and customarily used to serve a medical purpose.” *Id.* at 12.

9 Plaintiff sought judicial review in the U.S. District Court for the District of
10 Columbia. ECF No. 1. The case was transferred to this Court. ECF No. 14. Plaintiff
11 alleged six causes of action. ECF No. 1. Among other things, he claimed the
12 Appeals Council based its decision on CMS-1682-R, a “final opinion and order”
13 regarding CGM coverage, which the Department of Health and Human Services
14 issued without a public notice and comment period. *Id.* at 8. He also argued
15 substantial evidence did not support the Appeals Council’s decision to deny
16 coverage and its decision was arbitrary and capricious. *Id.* at 15. The Court granted
17 Plaintiff’s motion for summary judgment and ordered Defendant provide coverage,
18 finding that Plaintiff’s CGM constitutes durable medical equipment. ECF No. 39.

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1 LEGAL STANDARD

2 A party who prevails in a civil action against the United States is entitled to
3 costs under the EAJA. 28 U.S.C. § 2412(a)(1). Additionally, a party who prevails
4 in a civil action, other than a tort case, against the United States is entitled to
5 attorney fees and expenses under the EAJA, unless the Court finds the United
6 States' position was substantially justified or special circumstances make an award
7 unjust. 28 U.S.C. § 2412(d)(1)(A). If the United States "acted in bad faith,
8 vexatiously, wantonly, or for oppressive reasons," the Court may award attorney
9 fees at market value, rather than at the statutory rates. *Ibrahim v. U.S. Dep't of*
10 *Homeland Sec.*, 912 F.3d 1147, 1180 (9th Cir 2019) (quoting *Rodriguez v. United*
11 *States*, 542 F.3d 704, 709 (9th Cir. 2008)). "The purpose of such award is to deter
12 abusive litigation in the future, thereby avoiding harassment and protecting the
13 integrity of the judicial process." *Id.* (internal quotation omitted).

14 DISCUSSION

15 Plaintiff seeks market-value attorney fees under Section 2412(b), arguing that
16 Defendant's position in this case was in bad faith. *See* ECF No. 43. This Court
17 agrees. A Court should find bad faith when the government "knowingly or
18 recklessly raises a frivolous argument." *Rodriguez*, 542 F.3d at 709 (quoting *Primus*
19 *Auto. Fin. Servs. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997)). "A frivolous
20 [defense] is one that is groundless . . . with little prospect of success," such as one

1 in which “the government’s position was foreclosed by binding precedent or so
2 obviously wrong as to be frivolous.” *See id.* (ellipsis in original; internal quotation
3 and citation omitted). A court “must review the totality of the government’s
4 conduct” and “may examine the government’s actions that precipitated the
5 litigation, as well as the litigation itself.” *See Ibrahim*, 912 F.3d at 1180, 1181. But
6 “it is unnecessary to find that every aspect of a case is litigated by a party in bad
7 faith in order to find bad faith by that party.” *Rodriguez*, 542 F.3d at 712.

8 Plaintiff argues that Defendant “took steps to maximize judicial and party
9 resources and delay,” that he changed his basis for the rejection of Plaintiff’s claims,
10 and that unfavorable opinions by five district courts has not deterred him. ECF No.
11 43 at 3. In *Zieroth v. Azar*, No. 20-cv-00172-MMC, 2020 WL 7075629, at *2–3
12 (N.D. Cal. Dec. 3, 2020), the Northern District of California considered nearly this
13 exact issue. Like this case, the court had granted summary judgment in favor of
14 plaintiff, ordering that the Secretary cover the at-issue CGM under Medicare. *Id.* at
15 *1. When faced with a motion for attorney fees, though, the court determined that
16 the Secretary did not act in bad faith. *Id.* at *2–3. That court reasoned that “the
17 Secretary’s position was not wholly lacking in support,” and “the Secretary’s
18 position has not changed.” *Id.* Unlike in this case, Plaintiff in *Zieroth* requested, in
19 the alternative, statutory fees under Section 2412(d), which the court awarded. *Id.*
20 at *2.

1 This Court disagrees with the Court in *Zieroth* and determines that Defendant
2 in this case “knowingly or recklessly raise[d] a frivolous argument.” *See Rodriguez*,
3 542 F.3d at 709. For all the reasons explained in the Order granting summary
4 judgment for Plaintiff, ECF No. 39, Defendant’s defense was “groundless.” *See*
5 *Rodriguez*, 542 F.3d at 709. While Defendant’s position was not foreclosed by
6 binding precedent, the Court determines that it was “so obviously wrong as to be
7 frivolous.” *See id.* Every court to consider a claim like Plaintiff’s has ruled the same
8 way as this Court—concluding the plaintiff is entitled to relief. *See Zieroth v. Azar*,
9 No. 20-cv-00172-MMC, 2020 WL 5642614, at *4; *Whitcomb v. Hargan*, 2:17-CV-
10 00014, 2017 U.S. Dist. LEXIS 216571, at *15 (E.D. Wisc. Oct. 26, 2017); *Bloom*
11 *v. Azar*, No. 5:16-cv-121, 2018 WL 583111, at *10 (D. Vt. Jan. 29, 2018), *reversed*
12 *on other grounds by* 976 F.3d 157 (2d. Cir. 2020); *Lewis v. Azar*, 308 F. Supp. 3d
13 574, 579 (D. Mass. 2018). Yet Defendant has continued to assert its untenable
14 position, wasting judicial and party resources.

15 And this Court agrees that Defendant has changed its position. *Compare AR*
16 013 (stating that a CGM is not “durable medical equipment” because they do not
17 replace blood glucose monitors) *with* ECF No. 47 at 6 (stating that Defendant’s do
18 not cover certain CGMs because they are supposedly less accurate than blood-
19 glucose monitors). Under either argument, Defendant fails, but the Court finds
20 further bad faith in Defendant’s mischaracterization of the justification of the denial

1 of coverage. Altogether, Defendant's conduct meets the "high threshold" for an
2 award of bad-faith fees.¹ *See Primus Auto. Fin. Servs.*, 115 F.3d at 649.

3 Accordingly, **IT IS HEREBY ORDERED:**

- 4 1. Plaintiff's Motion for Attorneys' Fees, ECF No. 43, is **GRANTED** in
5 the amount of **\$68,675.95**.
- 6 2. The Commissioner of the Social Security Administration is
7 **DIRECTED** to pay EAJA attorney fees and costs in the amount of
8 **\$68,675.95**.
- 9 3. The EAJA award shall be made **PAYABLE DIRECTLY TO**
10 **PLAINTIFF'S COUNSEL**, Casey M. Bruner, and can be mailed to
11 422 W. Riverside Avenue, Suite 1100, Spokane, Washington 99201.
- 12 4. EAJA costs, attorney fees, and expenses, are subject to any offsets
13 allowed under the Treasury Offset Program, as discussed in *Astrue v.*
14 *Ratliff*, 560 U.S. 586 (2010).

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18 19 20 ¹ The Court agrees with Defendant that Defendant's objection to venue does not constitute bad faith. *See* ECF No. 47 at 9. But the Court agrees with Plaintiff that Defendant's failure to file the Administrative Record until directed by the Court (and even Defendant filed it three days after the deadline) is vexatious and contributes to the Court's determination of bad faith. *See* ECF Nos. 37, 38.

5. The Clerk's Office is directed to CLOSE this file.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 20th day of April 2021.

Sandra Mendoza

SALVADOR MENDOZA, JR.
United States District Judge